National Labor Relations Board Weekly Summary of

NLRB Cases

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of NLRB Pittsburgh, PA Office

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Diversified Enterprises, Inc. (9-CA-43110; 353 NLRB No. 120) Mount Hope, WV March 26, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by demoting and removing certain benefits from an employee because he engaged in union activities. In this connection, the Board noted that the Respondent acted on a purported, but erroneous, belief that the employee was a supervisor. The Board also adopted the judge's findings that the Respondent violated Section 8(a)(1) by informing the employee that he had been demoted because of union activities, and by threatening employees, and informing them that they were working less favorable shift hours, because they engaged in union activities. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charge filed by Mid-Atlantic Regional Council of Carpenters, West Virginia District; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Beckley on May 29, 2007. Adm. Law Judge Eric M. Fine issued his decision July 27, 2007.

Horizon Contract Glazing, Inc. (20-CA-32880(E); 353 NLRB No. 118) Sacramento, CA March 29, 2009. The Board adopted the administrative law judge's denial of the Applicant's request for attorneys' fees and expenses pursuant to EAJA. The Board agreed with the judge that conflicting inferences about the Applicant's motivation for refusing to recall alleged discriminatee Joseph Upchurch could reasonably be drawn from testimony about statements made during his Nov. 8, 2005 conversation with the Applicant's secretary-treasurer, Michelle Klein. The Board noted that it is well established that the General Counsel's litigation position is substantially justified where it is possible to draw a set of inferences that would have supported the General Counsel's position. See *Meaden Screw Products Co.*, 336 NLRB 298, 302-303 (2001); Europlast, Ltd., 311 NLRB 1089 (1993), affd. 33 F.3d 16 (7th Cir. 1994). The Board also noted that apart from the evidence about the Nov. 8, 2005 conversation, the General Counsel presented evidence of the Applicant's shifting defenses for refusing to recall Upchurch, as well as other circumstantial evidence that, if credited, might reasonably have established the animus element of the General Counsel's prima facie case. The Board noted that this evidence provided further support for finding that the General Counsel's litigation position was substantially justified. The Board finally noted that it is well established that "where the General Counsel is compelled by the existence of a substantial credibility issue to pursue the litigation, and therefore to present evidence, which, if credited, would constitute a prima facie case, the General Counsel's case has a reasonable basis in fact and law and is substantially justifies" (citations omitted). See Golden Stevedoring Co., 343 NLRB 115,116 (2004). [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Adm. Law Judge Jay R. Pollack issued his supplemental decision Jan. 15, 2009.

KSM Industries, Inc. (30-CA-13762, et al.; 353 NLRB No. 117) Germantown, WI March 26, 2009. In this backpay case, the Board adopted the administrative law judge's findings that strikers who were unlawfully denied recall or whose recall was delayed did not abandon employment by tendering resignations in order to receive payouts from retirement funds and payments for accrued vacation time. It also found that a striker who responded "no" to a recall interest questionnaire did not abandon employment in the absence of a valid offer of reinstatement. The Board adopted the judge's findings that the General Counsel's method of determining the order of recall and that the backpay periods for certain strikers were appropriate. With one exception, the Board adopted the judge's findings that certain strikers engaged in reasonable efforts to mitigate backpay despite quitting nonequivalent interim employment or being terminated from interim employment. The Board reversed the judge's finding that a striker who applied for one job in a 6-month period engaged in sufficient efforts to mitigate and denied him backpay for two quarters of his backpay period. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charges filed by United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union Local 2-779; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Milwaukee, March 26-30 and April 4-6, 2007. Adm. Law Judge David I. Goldman issued his decision Sept. 27, 2007.

Ridgeview Industries, Inc. (7-CA-50170, et al.; 353 NLRB No. 119) Walker, MI March 25, 2009. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by reprimanding employees Ben Balczak and Glenn Gentz, by discharging Gentz, and by imposing a job jeopardy agreement on employee Dave Smith. The Board also adopted the judge's finding that the Respondent violated Section 8(a)(1) by threatening Smith. In adopting the judge's finding that Gentz's discharge was unlawful, the Board relied particularly on the evidence of disparate treatment. Member Schaumber found it unnecessary to pass on the judge's other reasons for finding the violation. Regarding the judge's Wright Line analysis of the alleged Section 8(a)(3) violations, Member Schaumber relied only on the Respondent's numerous Section 8(a)(1) violations as evidence of animus, and did not rely on the Respondent's public statements in opposition to the union campaign. Chairman Liebman concurred with all of the judge's grounds for finding anti-union animus, though like Member Schaumber, she found that the Respondent's Section 8(a)(1) violations were sufficient proof of animus. [HTML] [PDF]

(Chairman Liebman and Member Schaumber participated.)

Charges filed by UAW and Glenn Gentz, an individual; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Grand Rapids, April 23 and June 3-6, 2008. Adm. Law Judge Mark D. Rubin issued his decision Oct. 27, 2008.

Southern Power Co. (10-CA-37348, 37414; 353 NLRB No. 116) Atlanta, GA March 20, 2009. The Board affirmed the administrative law judge's finding that the Respondent was a successor employer and had violated Section 8(a)(5) of the Act by refusing to recognize and bargain with International Brotherhood of Electrical Workers (IBEW) System Council U 19, on behalf of Local 801-1, as the exclusive bargaining representative of operation technicians in one plant previously operated by Alabama Power, and by refusing to recognize and bargain with IBEW Local 84 as the exclusive bargaining representative of operation technicians in three plants previously operated by Georgia Power. [HTML] [PDF]

The Board, however, reversed the judge and found that the Respondent failed to prove that a bargaining unit consisting of operation technicians at all three former Georgia Power plants was not an appropriate unit. The Board found that the judge failed to give any weight to the historical representation of employees in the three former Georgia Power plants and erred by failing to give proper consideration to the importance of multiplant bargaining history in his unit determination. The Board further found that the Respondent failed to show compelling circumstances why a three-plant bargaining unit was no longer appropriate.

(Chairman Liebman and Schaumber participated.)

Charges filed by Electrical Workers (IBEW) Local 84; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Birmingham on Sept. 8, 2008. Adm. Law Judge Lawrence W. Cullen issued his decision Nov. 3, 2008.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Corrections Corp. of America (an Individual) Tutwiler, MS March 27, 2009. 26-CA-23180; JD(ATL)-4-09, Judge William N. Cates.

Pearson's Enterprises, Inc. t/a Pearson Honda (an Individual) Richmond, VA March 27, 2009. 5-CA-34173; JD-12-09, Judge John T. Clark.

NO ANSWER TO COMPLAINT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Five Star Interiors, LLC (Construction Workers Local 10) (7-CA-51218; 353 NLRB No. 122) Midland, MI March 27, 2009. [HTML] [PDF]

NON-COMPLIANCE WITH SETTLEMENT AGREEMENT

(In the following case, the Board granted the General Counsel's motion for summary judgment based on the Respondent's non-compliance with a settlement agreement.)

M. Mogul Enterprises, Inc. d/b/a MSK Cargo/King Express (Teamsters Local 657) (16-CA-24374; 353 NLRB No. 121) Harlingen, TX March 27, 2009. [HTML] [PDF]

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to Reports of Regional Directors or Hearing Officers)

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

OPW Fueling Components, Cincinnati, OH, 9-RD-2168, March 25, 2009 (Chairman Liebman and Member Liebman)

Miscellaneous Board Decisions and Orders

ORDER [granting remand of case to Regional Director for further appropriate action]

South Peninsula Hospital, Inc., Homer, AK, 19-RC-15134, March 26, 2009
